UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

Recourse by the United States to Article 22.6 of the DSU

(WT/DS217-DS234)

Preliminary Ruling Requests of the United States of America

February 19, 2004

I. Introduction

1. The issue of suspension of concessions was a sensitive one for many countries during the Uruguay Round negotiations which concluded in Marrakech in 1994. Members ultimately decided upon rules to ensure that when, as a last resort, a Member considered it necessary to suspend concessions under multilateral WTO rules, that suspension would be subject to disciplines, and to limits, the most fundamental of which would be that the level of suspension authorized would be equivalent to the level of nullification or impairment of the benefits of that Member.

2. It has been a given in arbitrations to date pursuant to Article 22.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") that the determination of this equivalence is undertaken through a careful, objective, empirical analysis, one that focuses on actual trade harm to the complaining Member caused by the measure at issue of the responding Member. The proceedings have involved counterfactual analyses of trade patterns under alternative scenarios, and have involved extensive data submissions and economic analyses, with a view to determining the actual trade harm to the particular Member in the most accurate manner possible.

3. In these disputes, Brazil, Canada, Chile, the European Communities ("EC"), India, Japan, Korea and Mexico (collectively, the eight "Requesting Parties") have proposed a different approach. They would take the concept of suspension of concessions and untether it from any actual level of nullification or impairment of their benefits. With one exception, they would even presume to suspend concessions on behalf of other WTO Members. This irresponsible approach is fundamentally at odds with the DSU and past GATT/WTO practice, and, if accepted, would turn Article 22.6 proceedings into speculative ventures based not on empirical evidence, but on

whimsy and caprice. The rules governing these proceedings are identical to those governing earlier Article 22.7 arbitrations, and there is no principled justification for disregarding the DSU and applying a different approach from that taken in the past. Indeed, any approach taken here should be equally applicable to the situations which have been presented in past disputes, and which will again be presented in future disputes.

4. Specifically, the requests for suspension of concessions in these disputes are extraordinary in several respects:

- Seven of the Requesting Parties (i.e., all but Chile) want to suspend concessions on behalf of *other* WTO Members by dividing among themselves a "share" or "proportionate amount" of offset payments that can only be attributed to dumped and subsidized products from countries that are not parties to these arbitrations.

- Each of the eight wants to take the unprecedented step of establishing multiple "levels" of suspension (i.e., a new level each year).

- Each of the eight fails to provide the fundamental information necessary to determine equivalence:

  • None identifies the amount of its trade that it believes is affected by the Continued Dumping and Subsidy Offset Act ("CDSOA"), the measure at issue.

  • Each seeks to collect a certain amount of duties, irrespective of the amount of trade affected by that collection or by the CDSOA. None identifies the rate of duty it intends to apply, the amount of duties it intends to collect, or the amount of imports from the United States that would be lost as a result of the proposed suspension.

  • Canada intends to take measures in the form of "one or both" of the following: (1) the imposition of additional duties; (2) "the suspension of the application of the obligations under Article VI of GATT 1994, Articles 3, 5, 7, 8, 9, 10, 11, and 12 of the Anti-dumping Agreement, and Articles 11, 12,[1] 15, 17, 18, 19, 20, 21, and 22 of the *SCM Agreement* to determine the effect of dumping or subsidization of products from the United States is to

[1] While Article 6 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Anti-Dumping Agreement*") contains similar provisions regarding "evidence," Canada, inexplicably, only requests the suspension of obligations under Article 13 of the *Agreement on Subsidies and Countervailing Measures* (*"SCM Agreement"*), not the suspension of Article 6 of the *Anti-Dumping Agreement.*

> cause or threaten material injury". Thus, it is not clear (1) what Canada intends to do (e.g., it cites entire articles relating to "price undertakings," "retroactivity," and "public notice" requirements), (2) when it intends to do it (with its reference to "one or both" measures), or (3) how much trade would be affected.

5. These requests are, in several fundamental respects, inconsistent with Article 22 of the DSU. These arbitration proceedings will be complicated enough without having to complicate them further with a discussion of these issues throughout the course of the proceedings. According, the United States respectfully requests that the Arbitrator make the following preliminary rulings: (1) that the Requesting Parties cannot suspend concessions or other obligations based on the nullification or impairment suffered by other WTO Members and consequently the offset payments for products other than the Requesting Party's products are outside the scope of the arbitration proceeding with respect to that Requesting Party; (2) that the Requesting Parties have failed to specify the level of suspension and the level of nullification or impairment in such a way that allows the Arbitrators to determine equivalence and consequently each Requesting Party must provide the information necessary to allow the Arbitrator for that Requesting Party to make the determination called for under the DSU; and (3) that the request of a Requesting Party for a new level of suspension each year is inconsistent with Article 22 of the DSU and consequently is outside the scope of the arbitration proceeding for that Requesting Party.[2]

---

[2] For the convenience of the Arbitrators, and because the eight Article 22.2 requests have several elements in common, the United States submits these preliminary ruling requests in the form of a single document. The United States wishes to emphasize, however, that these preliminary ruling requests pertain to eight separate arbitrations, and not every issue raised in this submission applies to every arbitration. For example, because Chile does not seek to retaliate on behalf of other WTO Members, there is no need for a ruling on that issue in Chile's arbitration.

6. These preliminary rulings would provide clarity at the outset of the proceedings, reduce the issues confronting the Arbitrators, allow the Arbitrators and the parties to concentrate on the issues that are within the scope of these proceedings in the limited time available, avoid diverting time and resources to issues that are not relevant to these proceedings, and thereby significantly facilitate the task of the Arbitrators and the parties to these arbitration proceedings.

II. The Requesting Parties Cannot Suspend Concessions or Other Obligations for the Nullification or Impairment Suffered by All *Other* WTO Members

7. Seven Requesting Parties (all but Chile) have proposed the imposition of an additional import duty "so as to collect over one year additional duties equivalent to an amount established by adding (i) the amount of offset payments attributed to duties collected on products from [that Requesting Party] and (ii) a share of the balance of total offset payments less the offset payments attributed to duties collected on products from other members that are authorized by the DSB to suspend concessions or other obligations in this dispute."[3]

8. Because part "(ii)" of these proposals can only be read to relate to the alleged nullification or impairment of other Member's benefits, and because no WTO Member has the right to retaliate on behalf of another Member, the DSB cannot authorize such requests.

A. Part "(ii)" of These Proposals Relates to the Alleged Nullification or Impairment of Other Members' Benefits

9. Specifically, in part "(i)" of these proposals, each of these Parties asserts an *exclusive* right to suspend concessions in an amount equivalent to offset payments attributable to its *own*

---

[3] *United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse by Brazil to Article 22.2 of the DSU*, WT/DS217/20, 16 January 2004. *See also Recourse by Canada*, WT/DS234/25, *Recourse by the European Communities*, WT/DS217/22, *Recourse by India*, WT/DS217/23, *Recourse by Mexico*, WT/DS234/26, *Recourse by Japan*, WT/DS217/24, *Recourse by Korea*, WT/DS217/25.

dumped or subsidized products. By linking these offset payments to alleged harm to its dumped and subsidized products, each Party (by asserting an exclusive right to its own alleged trade damage) implicitly recognizes that any nullification or impairment of its benefits is due to the disbursement of offset payments attributable to the dumped and subsidized products of that Party. Consequently the Party recognizes that it is not entitled to consider offset payments that are attributable to the dumped and subsidized products of the other Requesting Parties. By the same token, each Party implicitly recognizes that it is not entitled to consider offset payments that are attributable to the dumped and subsidized products of other Members.

10. However, in part "(ii)" of these proposals, these Parties simply divide among themselves an amount that corresponds to duties collected on dumped and subsidized products from all *other* countries – including non-WTO Members and WTO Members who either were not complainants in the underlying disputes or who were complainants but did not request authorization to suspend obligations under Article 22.2 (i.e., Australia, Indonesia and Thailand). To the extent this "share" or "proportionate amount"[4] nullifies or impairs the benefits of any WTO Member, it could do so only with respect to the benefits of Members not a party to this proceeding, Members who have not requested authorization to suspend concessions or those who do not even have a right to request authorization because they were not complainants in the original disputes.[5]

---

[4] Canada, the EC, India, Mexico, Japan, and Korea refer to "a proportionate amount" in their Article 22.6 requests, while Brazil refers to "a share." Although, as discussed, the offset payments for Members other than the Requesting Party are outside the scope of the proceedings for that Party, the United States notes here too the Requesting Parties have continued their approach of using vague language. No Requesting Party has indicated how this "share" or "proportionate amount" is to be calculated. Would the Party have it calculated simply by dividing the amount by 7? By the weighted trade average? By the weighted share of offset payments?

[5] In addition, Mexico's request with respect to Mexican products is limited to offset payments attributable to dumped Mexican products, while Mexico asks for a proportionate amount of the offset payments resulting from both dumped and subsidized products of other Members. In so doing, Mexico implies that the only nullification or

(continued...)

11. Consider, for example, a tropical product such as canned pineapple. Canadian canned pineapple – if there were such a thing – is neither subject to antidumping duties in the United States, nor, to our knowledge, even exported to the United States. Nevertheless, Canada has taken it upon itself to retaliate against offset payments made to U.S. pineapple producers from duties paid with respect to imports into the United States of Thai canned pineapple. While Thailand's benefits under the WTO agreements may or may not have been nullified or impaired as a result of these offset payments, Canada's benefits clearly have not been.

B. No WTO Member Has the Right to Retaliate on Behalf of Another WTO Member

12. Article 22.4 of the DSU provides: "The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment."[6] A review of Article XXIII:1 of the *General Agreement on Tariffs and Trade* ("GATT 1947"), of other relevant provisions of the WTO agreements, and of previous arbitration awards such as the one in *Bananas* can leave no doubt that "nullification or impairment" in Article 22.4 (and Article 22.7) of the DSU refers to the nullification or impairment of a benefit accruing *to the specific requesting WTO Member* directly or indirectly under a WTO agreement.

1. Article XXIII:1 of the GATT 1947 and Other Provisions of the WTO Agreements

13. The reference to "nullification or impairment" in Article 22 of the DSU is derived from Article XXIII:1 of the *GATT 1947*. Article XXIII:1 provides, in pertinent part: "If any

---

[5](...continued)
impairment it is suffering from the CDSOA concerns the Anti-Dumping Agreement, and so Mexico's request seeks not only the suspension of concessions based on products that are not Mexican, but also based on claims that do not relate to Mexico.

[6] *See also* Article 22.7 of the DSU.

contracting party should consider that any benefit *accruing to it* directly or indirectly under this Agreement is being nullified or impaired ... the contracting party may ... make written representations or proposals to the other contracting party or parties[.][7] Thus, under Article XXIII:1, a contracting party cannot engage the dispute settlement process based on the possible nullification or impairment of *another* contracting party's benefits.

14. Footnote 12 of the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*"), which provides one of the bases for the underlying disputes in this case, further confirms that "[t]he term 'nullification or impairment' is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions." Article 30 of the *SCM Agreement* also states that "[t]he provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein."

15. Other relevant provisions of the WTO agreements further support the conclusion that the term "nullification or impairment" in Articles 22.4 and 22.7 of the DSU refers to the nullification or impairment of a benefit *to that specific Member* requesting authorization to suspend concessions or other obligations. For example, the *Anti-Dumping Agreement*, which also provides one of the bases for the underlying disputes in this case, states: "If any Member considers that any benefit *accruing to it*, directly or indirectly, under this Agreement is being

[7] Article XXIII:1 of GATT 1947 (emphasis added). *See also* Article 3.1 of the DSU ("Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of the GATT 1947, and the rules and procedures as further elaborated and modified herein.").

nullified or impaired ... by another Member or Members, it may ... request in writing consultations with the Member or Members in question."[8]

16. Moreover, Article 3.3 of the DSU provides: "The prompt settlement of situations in which a Member considers that any benefits *accruing to it* directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential[.]"[9]

17. Finally, Article 7.2 of the *SCM Agreement*, which relates to disputes over actionable subsidies, provides that a request for consultations "shall include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question, and (b) the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice caused *to the interests of the Member requesting consultations.*"[10] Although these disputes do not involve an actionable subsidy, Article 7.2 nevertheless provides further context for interpreting the term "nullification or impairment" in Article 22 of the DSU as dealing only with nullification or impairment of benefits accruing to the WTO Member requesting authorization to suspend concessions.

2. The Arbitrator's Findings in *Bananas*

18. According to the Arbitrator in *Bananas*, "there is no right and no need under the DSU for one WTO Member to claim compensation or request authorization to suspend concessions for the nullification or impairment suffered by another WTO Member with respect to goods bearing

---

[8] Article 17.3 of the *Anti-Dumping Agreement* (emphasis added).
[9] Article 3.3 of the DSU (emphasis added).
[10] Article 7.2 of the *SCM Agreement* (emphasis added).

the latter's origin[.]"[11] In that arbitration, the United States argued that U.S. exports to Latin America (e.g., fertilizers) used in the production of bananas that would be exported to the EC under a WTO-consistent regime should be counted in setting the level of suspension.[12]

19. The Arbitrator found that, if the DSB were to authorize one Member to suspend concessions based on another Member's nullification or impairment, it would be taking away the other Member's right to suspend its own concessions or obligations: "Given that the *same* amount of nullification or impairment inflicted on *one* Member cannot simultaneously be inflicted on *another*, the authorizations to suspend concessions granted by the DSB to different WTO Members could exceed the overall amount of nullification or impairment[.][13] The Arbitrator concluded that the "right to seek redress for that amount of nullification or impairment

---

[11] Article 22.6 Arbitration Award in *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999 ("*Bananas* Arbitration Award (U.S. Request)"), para. 6.14. While the Arbitrator in *United States – Tax Treatment for "Foreign Sales Corporations"* authorized the EC to take "appropriate countermeasures" in the entire amount of the prohibited subsidy, including subsidies applied to products that were exported to other WTO Members, the Arbitrator quite clearly distinguished the standard that it applied under Article 4.10 of the *SCM Agreement* from the standard under Article 22 of the DSU. *See, e.g.,* Arbitration Award in *United States – Tax Treatment for "Foreign Sales Corporations – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, 30 August 2002, para. 5.47 ("There can be no presumption, therefore, that the drafters intended the standard under Article 4.10 to be necessarily coextensive with that under Article 22.4 so that the notion of 'appropriate countermeasures under Article 4.10 would limit such countermeasures to an amount 'equivalent to the level of nullification or impairment' suffered by the complaining Member. Rather, Articles 4.10 and 4.11 of the *SCM Agreement* use distinct language and that difference must be given meaning."). Article 4.10 of the *SCM Agreement* only addresses countermeasures against prohibited subsidies under Part II of the *SCM Agreement*. Because the underlying disputes did not include any findings under Part II of the *SCM Agreement*, Article 4.10 is irrelevant to these arbitrations.

[12] *See Bananas* Arbitration Award (U.S. Request), para. 6.6.

[13] *Bananas* Arbitration Award (U.S. Request), para. 6.16. *See also* Article 3.5 of the DSU: "All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements[.]" If an Article 22.6 arbitrator were to grant an excessive award to one WTO Member, that award could effectively limit another WTO Member's right to suspend concessions at some point in the future, thereby nullifying or impairing the other Member's benefits under the DSU.

does exist under the DSU for the WTO Members which are the countries of origin for these bananas, but not for the United States."[14]

20. Based on the above considerations, the Arbitrators should find that part "(ii)" of each of the seven Requesting Parties' requests is outside the scope of the arbitration proceedings for each of those Parties, as that part does not relate to any nullification or impairment potentially suffered by those Parties.

III. The Requesting Parties Have Failed to Specify the Level of Suspension and the Level of Nullification or Impairment in a Way that Allows the Arbitrator to Determine Equivalence

21. The DSB cannot grant a requesting party authorization to suspend concessions or other obligations if that party fails to provide the Arbitrator with the information it needs to fulfill its mandate under Article 22:

> [A]s a prerequisite for ensuring equivalence between the two levels, [the arbitrator has] to be able to determine, not only the "level of the nullification or impairment", but also the "level of the suspension of concessions or other obligations". To give effect to the obligation of equivalence in Article 22.4, the Member requesting suspension thus has to identify the level of suspension of concessions it proposes in a way that allows [the arbitrator] to determine equivalence.[15]

22. In fact, the arbitrator in *Bananas* found that, because Article 22.2 requests serve the same "due process objectives" as requests under Article 6.2 of the DSU, the specificity standards that WTO panels have applied under Article 6.2 are relevant to Article 22.2 requests:

---

[14] *Bananas* Arbitration Award (U.S. Request), para. 6.14. In addition, the Arbitrator found that "the calculation of the level of nullification or impairment suffered by other original complainants ... is not within our terms of reference in this arbitration proceeding between the European Communities and the United States only." *See Bananas* Arbitration Award, para. 6.17. The same conclusion can be reached with respect to these seven Article 22.2 requests.

[15] Arbitration Award in *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999, para. 20.

> The DSU does not explicitly provide that the specificity requirements, which are stipulated in Article 6.2 for panel requests, apply *mutatis mutandis* to arbitration proceedings under Article 22. However, we believe that requests for suspension under Article 22.2, as well as requests for referral to arbitration under Article 22.6, serve similar due process objectives as requests under Article 6.2. First, they give notice to the other party and enable it to respond to the request for suspension[.] Second, a request under Article 22.2 by a complaining party defines the jurisdiction of the DSB in authorizing suspension by the complaining party.[16]

23. Indeed, these concerns are even more serious with respect to Article 22.2 requests than they are with respect to requests under Article 6.2. In the first instance, the DSU contemplates that the DSB could approve a request without recourse to arbitration. DSB consideration of a request requires a certain degree of specificity in the request. Otherwise the DSB would not know what it is that it is approving. A lack of specificity may also generate needless arbitrations by forcing a responding Member to object to the request simply because the request is too unclear.

24. Second, as a general matter, the complaining party *making* an Article 6.2 request for the establishment of a panel also bears the burden of proving a violation of a WTO agreement.[17] By contrast, the objecting party *responding* to an Article 22.2 request bears the burden of proving that the level of suspension proposed by the requesting party in its Article 22.2 request is not equivalent to the level of nullification or impairment suffered by that same requesting party.[18] At the same time, the arbitrator is entrusted with determining whether the proposed level of

---

[16] Arbitration Award in *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, 24 March 2000 ("*Bananas* Arbitration Award (Ecuador Request)"), para. 20.

[17] *See, e.g.,* Appellate Body Report in *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 23 May 1997, pp. 13-16.

[18] *See, e.g., Bananas* Arbitration Award (Ecuador Request), para. 38.

suspension is equivalent to the level of nullification or impairment of the benefits of the complaining Member. Without the necessary information in the Article 22.2 request, the objecting party's due process rights would be adversely affected and the arbitrator may be unable to complete the task assigned for it.

A. The Requests to Collect Additional Duties Based on Offset Payments Fail to Specify the Level of Suspension and the Level of Nullification or Impairment in a Way that Allows the Arbitrator to Determine Equivalence

25. The Requesting Parties generally seek to impose additional import duties on U.S. products and state that "the rate of the additional duty will be set so as to collect" over one year additional duties equivalent to certain offset payments under CDSOA.[19] They fail, however, to identify (and, as a result, *set no limit on*) the amount of trade that would be covered by their requests. Instead, they simply propose the imposition of an unidentified "additional duty" (on imports of an unidentified list of products) until they collect a sum that is equivalent to the amount of offset payments. The effect that this "additional duty" will have on trade will depend, of course, on the amount of the additional duty: an additional duty of one percent generally would restrict trade by much less than would an additional duty of 100 percent, which often has been assumed to be "prohibitive."[20] Thus, it is impossible to determine the "level" of suspension proposed. To make matters worse, each of these Parties also fails to provide any estimate or information about the level of nullification or impairment.

---

[19] It is not clear from the Article 22.2 requests of Canada, Chile and Mexico whether the intent is to set the duty rate "so as to collect" additional duties, or, instead, whether the intent is to set the duty rate at a prohibitive level and base the level of suspension on the amount of lost imports from the United States.

[20] The amount of the difference in trade effects would depend on the product and the elasticity of demand for that product.

26. These requests stand in stark contrast to the requests that arbitrators approved in previous Article 22.6 proceedings. For example, the arbitrator in *Bananas* found that Ecuador's Article 22.2 request was sufficiently specific because it "sets out the specific amount of US$450 million as the level of proposed suspension of concessions or other obligations."[21] Similarly, the arbitrator in *Bananas* found that the level of suspension proposed by the United States "is clearly discernible in respect of the overall amount (US$520 million) suggested by the United States as well as in terms of the product coverage envisaged."[22] In each of these requests, the requesting party set a clear level on the amount of suspension proposed by identifying the maximum amount of trade that would be affected by an increase in duties above bound rates. This is the standard practice when a party intends to suspend tariff concessions.[23]

27. Because the eight Requesting Parties failed to include this information in their requests, the Arbitrators should issue preliminary rulings that these parties have not satisfied the specificity

---

[21] *Bananas* Arbitration Award (Ecuador Request), para. 22.

[22] *Bananas* Arbitration Award (U.S. Request), para. 4.2.

[23] *See, e.g., Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse by New Zealand to Article 22.2 of the DSU*, WT/DS113/17, 19 February 2001 (New Zealand and the United States each proposed suspending the application to Canada of tariff concessions "covering trade in the amount of US$35 million."); *Australia – Measures Affecting Importation of Salmon – Recourse by Canada to Article 22.2 of the DSU*, WT/DS18/12, 15 July 1999 (Canada proposed suspending the application to Australia of tariff concessions and related obligations "covering trade in the amount of Can $45 million."); *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse by Canada to Article 22.2 of the DSU*, WT/DS48/17, 20 May 1999; *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse by the United States to Article 22.2 of the DSU*, WT/DS26/19, 18 May 1999 (Canada proposed suspending the application to the EC of tariff concessions "covering trade in the amount of $75 million[,]" while the U.S. proposal would "cover[] trade in an amount of US$202 million."); *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse by the United States to Article 22.2 of the DSU*, WT/DS27/43, 14 January 1999; *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse by Ecuador to Article 22.2 of the DSU*, WT/DS27/52, 9 November 1999 (The United States proposed the suspension of tariff concessions "covering trade in an amount of US$520 million[,]" while Ecuador stated in its request that the level of nullification or impairment was "US$450 million," which was equivalent to "50 per cent of all exports of goods by the EC to Ecuador.").

requirements for an Article 22.2 request. Accordingly, each Requesting Party should immediately provide the necessary information (perhaps in its methodology paper), or else the Arbitrator should determine for the Requesting Party that the request lacks any basis and the level of nullification or impairment is zero.

B. Canada's Special Request Fails to Specify the Level of Suspension and the Level of Nullification or Impairment in a Way that Allows the Arbitrator to Determine Equivalence

28. Canada intends to take measures in the form of "one or both of the following:

> (1) the imposition of additional import duties above bound customs duties on products originating in the United States. ...
>
> (2) the suspension of the application of the obligations under Article VI of GATT 1994, Articles 3, 5, 7, 8, 9, 10, 11 and 12 of the Anti-dumping Agreement, and Articles 11, 12, 15, 17, 18, 19, 20, 21 and 22 of the SCM Agreement to determine that the effect of dumping or subsidization of products from the United States is to cause or threaten material injury to an established domestic injury, or is to retard materially the establishment of a domestic industry."

29. This stated intention leaves much to the imagination. In fact, in *Brazil – Export Financing Programme for Aircraft*, an arbitration under Article 4.10 of the *SCM Agreement*, Brazil objected when Canada stated a similar intention. The Arbitrator acknowledged Brazil's concern that, "it is not clear how the impact of these measures will be assessed in terms of the value of the Brazilian trade to be affected."[24] However, because the arbitrator did not require specificity, in issuing its award it was placed in the rather awkward position of having to "urge" Canada "to make sure that, if it decides to proceed with the suspension of certain obligations ...

---

[24] Arbitration Award in *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement* ("Arbitration Award in *Brazil – Aircraft*), para. 3.17.

other than the 100 per cent surtax, this will be done in such a way that the maximum amount of countermeasures ... will be respected."[25]

30. The mandate of the Arbitrator in the present proceedings is to *ensure*, rather than to urge, that the level of suspension is equivalent to the level of nullification or impairment. The second part of Canada's request fails to provide any information as to the level of suspension proposed. Because Canada's request did not include this information, the Arbitrator should issue a preliminary ruling that this aspect of the request fails to provide the Arbitrator with the information it needs to determine equivalence. Accordingly, Canada should immediately provide the necessary information (perhaps in its methodology paper), or else the Arbitrator should determine that this part of Canada's request lacks any basis and the level of nullification or impairment is zero.

IV. Requests for a New Level of Suspension Each Year Are Inconsistent with Articles 22 and 23 of the DSU

31. Each of the eight Requesting Parties has requested authorization to alter the level of suspension of concessions each year, based on the amount of offset payments made in the latest annual distribution under the CDSOA. As the United States has explained, these requests do not relate to a level of nullification or impairment nor specify a level of suspension of concessions. In addition, at the outset of these proceedings, and for the following reasons, the Arbitrators should rule that the Requesting Parties are not permitted to determine a new level of suspension each year.

---

[25] Arbitration Award in *Brazil – Aircraft*, para. 4.2.

32. First, the terms of reference of an Article 22.6 arbitration are established when the matter is referred to arbitration.[26] As a result, "the level" of nullification or impairment must also be determined at that time. Otherwise, the requesting party would be able to arbitrarily pick some point in the past, present, or future for setting the level of nullification or impairment.

Second, Article 22.4 of the DSU makes clear that the DSB authorizes "the level" of suspension of concessions or other obligations. Similarly, Article 22.7 of the DSU provides that the arbitrator is to determine whether "the level" of suspension is equivalent to the level of nullification or impairment. Further, Article 23.2(c) of the DSU requires that Members follow the procedures set forth in Article 22 to determine "the level" of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions. The ordinary meaning of "the level" is a single and definite amount,[27] and the DSU provides no basis for the authorization of multiple, varying and indefinite "levels" of suspension.

33. Indeed, until now, requesting parties have uniformly understood that Article 22 established a single "level" of suspension. Not one previous request under Article 22.2 of the DSU included a proposal to determine a new level of suspension on a yearly basis. For example, in *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, New Zealand requested authorization to suspend tariff concessions "covering trade in the amount

---

[26] *See Bananas* Arbitration Award (Ecuador Request), para. 20 ("[A] request for arbitration under Article 22.6 defines the terms of reference of the Arbitrators.").

[27] A "level" is defined as "[a] position (on a real or imaginary scale) in respect of amount, intensity, extent, etc.; a relative height, amount, or value." New Shorter Oxford English Dictionary at 1573 (1993 edition). "The" is defined as the "definite article," "[d]esignating one or more persons or things already mentioned or known, particularized by context or circumstances, inherently unique, familiar, or otherwise sufficiently identified." New Shorter Oxford English Dictionary at 3269.

of US$35 million. *This level* of suspension is equivalent on an annual basis to the level of nullification or impairment of benefits accruing to New Zealand resulting from Canada's failure to bring its export subsidy measures concerning dairy products into compliance ... with the Agreement on Agriculture[.]"[28]

34. Just as DSU Articles 22.4 and 22.6 provide for the determination of a single "level" of suspension, DSU Articles 22.6 and 22.7 provide a single opportunity to adjudicate the question of whether the level of suspension of concessions is equivalent to the level of nullification or impairment. Indeed, DSU Article 22.7 provides, "The parties shall accept the arbitrator's decision as final and . . . shall not seek a second arbitration." However, this presupposes that the requesting party cannot modify the level of suspension subsequent to arbitration and DSB authorization, for DSU Article 22.7 would be devoid of meaning were it read to protect the rights only of the requesting party, and not those of the objecting party.

35. Finally, although not legally relevant since there is no basis for re-setting the level of suspension of concessions, the United States would note that there is a great deal of uncertainty as to how each Requesting Party would calculate its annual "level" of suspension each year. For example, because there is no simple connection between the annual amount of offset payments and the effect, if any, those payments have on trade (i.e., the level of nullification or impairment), basing levels of suspension on the yearly amounts of offset payments clearly does not ensure equivalence. Nor is it clear how the amount of offset payments would be determined or by whom. For example, would it be the amount published by the United States in a certain

---

[28] *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse by New Zealand to Article 22.2 of the DSU*, WT/DS113/17, 19 February 2001 (emphasis added).

publication? There may be litigation over the amount. Also, in the past, affected domestic producers have been required to reimburse the United States government for overpayments. It is not clear whether the Requesting Parties intend to deduct the amount of these overpayments from the annual amount of offset payments. Would these issues require a second arbitration, contrary to Article 22.7 of the DSU?

36. Even if the requests were related to the trade effects of the CDSOA, which they are not, the DSU does not contemplate an annual redetermination of the level of suspension of concessions and, in fact, prohibits any such redetermination. The Arbitrator should rule that the Requesting Parties are not permitted to determine a new level of suspension each year.

V. Conclusion

37. For the reasons stated above, the United States respectfully requests that the Arbitrator make preliminary rulings finding (1) that the Requesting Parties cannot suspend concessions or other obligations based on the nullification or impairment suffered by other WTO Members and consequently the offset payments for products other than the Requesting Party's products are outside the scope of the arbitration proceeding with respect to that Requesting Party; (2) that the Requesting Parties have failed to specify the level of suspension and the level of nullification or impairment in such a way that allows the Arbitrators to determine equivalence and consequently each Requesting Party must provide the information necessary to allow the Arbitrator for that Requesting Party to make the determination called for under the DSU; and (3) that the request of a Requesting Party for a new level of suspension each year is inconsistent with Article 22 of the DSU and consequently is outside the scope of the arbitration proceeding for that Requesting Party.

38. For these preliminary rulings to be of most use in allowing the parties and the Arbitrators to focus on the issues that are relevant to these proceedings, the United States respectfully suggests that the Arbitrators make these preliminary rulings prior to the submission by the Requesting Parties of their methodology papers. In that manner, those methodology papers can be devoted to the issues in the scope of the proceedings rather than diverting time and attention to issues outside the scope of these proceedings. The methodology papers could also provide the required information or else make clear that the relevant Requesting Party is willing to have the Arbitrator find that the request has no basis and therefore the level of nullification or impairment is zero.